Public Prosecutor v Abdul Jalil bin Ismail

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B-05-68 OF 1997
DENIS ONG JIEW FOOK, ALAUDDIN AND ABDUL AZIZ JJCA
31 OCTOBER 2003

Criminal Procedure *— Charge — Reduction of — Whether permissible — Accused was tried on a charge of trafficking in cannabis — Charge was reduced to one of possession at the close of case for prosecution — Trial judge reduced charge on perception that for the same act involving the substance that was the subject matter of the offence in this case, the Act created two offences v Dangerous Drugs Act 1952*

The respondent was tried in the High Court on a charge of trafficking in cannabis. The offence was under s 39B(l)(a) of the Dangerous Drugs Act 1952 ('the Act') and was punishable with death under s 39B(2) of the Act. At the close of the case for the prosecution, the trial judge amended the charge to one of possession of cannabis under s 12(2) of the Act, whereupon the respondent pleaded guilty to the charge and the judge sentenced him to four years' imprisonment under s 12(3). The public prosecutor appealed to the Court of Appeal against the amendment of the charge.

Held, allowing the appeal:

(1) What moved the trial judge to reduce the charge was his perception that for the same act involving the substance that was the subject matter of the offence in this case, the Act created two offences. The trial judge perceived that for the same act involving the substance in this case, the Act created two offences, according as to whether the substance was taken, for the purposes of the Act, as going by the name 'cannabis' or the name 'Indian hemp' (see pp 749I–750B).

(2) The absence of doubt became starkly clear when the case was one of possession of 200g or more in weight of the substance, as was actually the present case, because then the presumption of a different offence arises under s 37(da) of the Act, namely the presumption of trafficking in the substance. The substance being cannabis, the presumption arises, even though it is also known as Indian hemp and Indian hemp is not included in s 37(da). The substance being cannabis, and cannabis being included in the section, the fact that it was also known as Indian hemp was not relevant to the question of the application of s 37(da), as it would have been relevant to the question of the appropriate basic penalty for unauthorized possession. Therefore, the trial judge was in error in his reasons for reducing the charge in this case (see p 751B–D).

[Bahasa Malaysia summary

Responden telah dihadapkan ke Mahkamah Tinggi atas pertuduhan mengedar kanabis. Kesalahan tersebut adalah di bawah s 39B(l)(a)

Akta Dadah Berbahaya 1952 ('Akta tersebut') dan boleh dihukum mati di bawah s 39B(2) Akta tersebut. Pada penutup kes pendakwaan, hakim perbicaraan telah meminda pertuduhan tersebut kepada satu milikan kanabis di bawah s 12(2) Akta tersebut, di mana responden telah mengaku bersalah terhadap pertuduhan tersebut dan hakim telah menjatuhkan hukuman empat tahun penjara ke atas beliau di bawah s 12(3). Pendakwa raya telah memohon kepada Mahkamah Rayuan terhadap pindaan kepada pertuduhan tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Apa yang menggerakkan hakim perbicaraan untuk mengurangkan pertuduhan tersebut adalah persepsi beliau bahawa untuk tindakan yang sama yang melibatkan bahan yang menjadi perkara pokok kesalahan dalam kes ini, Akta tersebut membentuk dua kesalahan. Hakim perbicaraan merasakan tindakan yang sama melibatkan bahan dalam kes ini, Akta tersebutmembentuk dua kesalahan, menurut sama ada bahan tersebut diambilkira, bagi tujuan Akta tersebut, dikenali sebagai nama 'cannabis' atau nama 'Indian hemp' (lihat ms 749I–750B).

(2) The absence of doubt became starkly clear when the case was one of possession of 200g or more in weight of the substance, as was actually the present case, because then the presumption of a different offence arises under s 37(da) of the Act, namely the presumption of trafficking in the substance. The substance being cannabis, the presumption arises, even though it is also known as Indian hemp and Indian hemp is not included in s 37(da). Disebabkan bahan tersebut adalah kanabis, dan kanabis terangkum dalam seksyen tersebut, hakikat bahawa ia juga dikenali sebagai Indian hemp tidak relevan kepada persoalan s 37(da), kerana ia mungkin relrevan kepada persoalan tentnag penalti yang sesuai as it would have been relevant to the question of the appropriate basic penalty for unauthorized possession. Oleh itu, hakim perbicaraan terkhilaf dalam alasan-alasan beliau apabila mengurangkan pertuduhan dalam kes ini (lihat ms 751B–D).

Notes

For cases on reduction of charge, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1151.

Cases referred to

Mohd Yusof bin Said v PP [1996] 1 MLJ 640 (refd)

Pendakwa Raya v Mohammad Khalafi Mahkamah Tinggi Shah Alam Perbicaraan Jenayah No 47–12–95, unreported (refd)

Shukri bin Mohamad v PP [1995] 3 MLJ 229 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 11(1), 12(2), (3), 37(da)(vi), 39A(1), (2), 39B(1)(a), 39B(2), Parts I, II, III, IV, V, First Schedule

Federal Constitution art 8(1)

Appeal from: Criminal Trial No 47–4 of 1996 (High Court, Shah Alam)

Abdul Wahab bin Mohamad (Deputy Public Prosecutor, Attorney-General's Chambers) for the appellant.

Karpal Singh (*Karpal Singh & Co*) for the respondent.

Abdul Aziz JCA (delivering judgment of the court): The respondent was tried in the High Court on a charge of trafficking in 1,833.92g of cannabis on 9 February 1996 at 2.20am in a room of a house in Kampung Pandan, Ampang, in the State of Selangor. The offence was under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and was punishable with death under s 39B(2) of the Act. After hearing the submission of Mr Karpal Singh, the respondent's counsel, at the close of the case for the prosecution, the trial judge amended the charge to one of possession of 1,833.92g of cannabis under s 12(2) of the Act, whereupon the respondent pleaded guilty to the charge and the judge sentenced him to four years' imprisonment under s 12(3). The public prosecutor appeals to this court against the amendment of the charge and against the sentence. He asks this court to set aside the decision of the trial judge and call upon the respondent to enter upon his defence to the original charge of trafficking under s 39B(1)(a).

We shall first dispose of a minor issue that was submitted on by the learned deputy public prosecutor in this appeal and which we believe is rooted in ground 4 in the petition of appeal. That ground says that the trial judge erred in law when, after finding that the prosecution had proved the case beyond reasonable doubt, he amended the charge to one under s 12(2). The assertion as to what the judge did is based on the judge's grounds of decision, and not on the judge's notes of proceedings, which do not show that the judge did as asserted. They show that after submissions at the close of the case for the prosecution the judge postponed his decision to another date, and on that date the first thing that he did was to announce the amendment of the charge. In his grounds of decision, however, the judge, after stating the facts of the case and explaining what is meant by a prima facie case, said at p 3, 'In the instant case I found that a prima facie case has been made out against the accused on the offence charged'. He then proceeded to consider the sole point raised by Mr Karpal Singh and concluded at p 6 as follows:

> Weighing all the evidence before me, I come to the conclusion that in the instant case Section 37 of DDA is not applicable to the charge. As stated earlier I have found the prosecution has established the charge against the accused beyond all reasonable doubt. For that reason I conclude that it

would be proper that the accused be charged for the lesser offence for possession of cannabis under s 12(2) of the DDA 1952. A

It is to be observed that in that passage he again said in effect that he found a prima facie case had been made out on the charge.

Mr Karpal Singh suggested to us that in the first quoted statement above, the word 'not' had inadvertently been left out and that the relevant words should read 'a prima facie case has not been made out'. But that would still leave the judge saying in the second quote to the effect that a prima facie case had been made out on the charge. The word 'not' could not have been inadvertently left out twice. B

We are of the view that the judge could not have made so fundamental an error as to have found the prosecution had made out a prima facie case of an offence under s 39B(1)(a) and then to have proceeded to reduce the charge, and that what actually happened was as recorded in the notes of proceedings. We think what the judge meant in his grounds of decision when he said that the prosecution had made out a prima facie case on the offence charged was simply that he found that the prosecution had made out a prima facie case of possession of the dangerous drug. He was expressing a finding of fact as to possession. We do not think there is any merit in ground 4. C D

We turn now to consider the main ground of this appeal, which questions the justification for the reduction of the charge.

In his submission at the close of the case for the prosecution, Mr Karpal Singh raised only one issue, and it was an issue of law that arose out of the testimony of the chemist who analyzed the substance that was the subject matter of the charge. That means that no question arose in the trial as to the respondent being in possession of the substance. Neither has such a question arisen in this appeal. Therefore, we do not propose to set out the facts from which the trial judge found that the prosecution had proved possession. The question of possession is relevant to the charge of trafficking in this case because according to s 37(da)(vi) of the Act a person who is found in possession of 200g or more in weight of cannabis shall be presumed, until the contrary is proved, to be trafficking in it. E F

Before setting out the testimony of the chemist that gave rise to the issue, and dealing with the issue, it is appropriate that we set out the provisions of the Act that are relevant to the issue. G

Section 2 of the Act defines 'dangerous drug' as any drug or substance in the First Schedule to the Act, which comprises four Parts. 'Cannabis' is included in Part I and Part II. Therefore cannabis is a dangerous drug. Section 2 further provides a definition of 'cannabis', Unauthorized possession of cannabis is an offence under s 6 for which the basic penalty is a fine of not exceeding twenty thousand ringgit or imprisonment for a term not exceeding five years or both. We say 'basic penalty' because s 39A provides for increased penalties depending on the amount of cannabis involved Unauthorized possession of a dangerous drug is also an offence under s 12(2), for which the basic penalty under s 12(3) at the date of offence in this case, namely 9 February 1996, was the same as the penalty H I

A under s 6. Section 12(2), however, according to s 11(1), applies to dangerous drugs listed in Parts III, IV and V of the First Schedule, and in those Parts there is no mention of 'Cannabis' by itself but there was, at the date of offence in this case, in Part III the inclusion of "Cannabis (Indian Hemp)". That item was subsequently removed from the First Schedule by an order made on 3 April 1996 and gazetted under PU(A) 170 of 1996. The B increased penalties prescribed by s 39A also apply to the offence under s 12(2) of possession of a dangerous drug in Part III, IV or V of the First Schedule if the drug is specified in s 39A. Section 39A does not specify 'cannabis (Indian hemp)' but does specify 'cannabis'.

If a person is found in possession of a particular amount or more of a C particular dangerous drug, being an amount and a drug specified in s 37(da), it will no longer be a case of increased penalty for the offence of possession of the dangerous drug, because in that case s 37(da) provides that the offender shall be presumed, until the contrary is proved, to be trafficking in the drug, which is a separate offence under s 39B(1)(a) punishable with death. Section 37(da) does not specify 'cannabis (Indian D hemp)' but does specify 'cannabis'. For cannabis, as we said, the amount specified by s 37(da)(vi) is 200g or more in weight.

The chemist in this case had testified in examination-in-chief that the plant material that he examined was cannabis as defined in s 2 of the Act. In cross-examination by Mr Karpal Singh, he had testified that cannabis E and Indian hemp or cannabis (Indian hemp) were the same andthat there was no difference between them. In re-examination he had confirmed that cannabis and Indian hemp or cannabis (Indian hemp) were different names for the same thing.

After the close of the case for the prosecution, as the only issue that he F had to raise, Mr Karpal Singh urged the trial judge, in view of the chemist's evidence that cannabis and Indian hemp or cannabis (Indian hemp) were the same thing, to follow his decision in *Pendakwa Raya v Mohammad Khalafi* Mahkamah Tinggi Shah Alam Perbicaraan Jenayah No 47–12–95 (unreported), and reduce the charge to one of possession under s 12(2). The trial judge acceded to Mr Karpal Singh's entreaty.

G In his grounds of decision, at p 4, referring to the evidence of the chemist, the judge said, 'In gist what he was paying was the fact that the dangerous drugs in the DDA were all the same', and therefore concluded, reiterating what he had said in *Mohammad Khalafi:* 'It follows that if they were all the same then the provisions for different punishments are, I think H is illogical and amount to a violation of art 8(1) of the Federal Constitution'. A little later, he said at p 5, reiterating what he had said in *Mohammad Khalafi,* that since cannabis and cannabis (Indian hemp) were the same, 'a doubt exists here as to their punishments because it was open to two constructions and in this case the lesser of the two offences should be followed because the benefit of the doubt should be given to the accused'.

I Laying aside his statement that according to the chemist the dangerous drugs in the Act were all the same, which obviously is not correct, we think what moved the judge to reduce the charge was his perception that for the

same act involving the substance that was the subject matter of the offence in this case, the Act created two offences. In order to give clarity to an evaluation of the soundness of that perception, we shall treat the item 'Cannabis (Indian Hemp)' in Part III of the First Schedule to the Act as simply 'Indian hemp'. The judge perceived that for the same act involving the substance in this case the Act created two offences, according as to whether the substance was taken, for the purposes of the Act, as going by the name 'cannabis' or the name 'Indian hemp'.

That perception, we think, would be true only to a certain extent. If the respondent had been in possession of, say, 15g of the substance in this case, taking it as going by the name of 'cannabis' he would have committed the offence of unauthorized possession of cannabis under s 6 and punishable under that section, because that section covers cannabis; but taking the substance as going by the name of 'Indian hemp', he would have committed an offence of unauthorized possession of Indian hemp under s 12(2) and punishable under s 12(3), because s 12 applies to a dangerous drug listed in Parts III, IV or V of the First Schedule and Indian hemp was included in Part III. It would have been a situation where, because the same substance is known by two names, the respondent could be liable to be punished for unauthorized possession of it under either s 6 or s 12(3). As the penalties then stood, the choice of the section under which to charge him would not have been a problem, because the penalties under the two sections were equal. But supposing the penalties had been different, as they are now, when the fine under s 12(3) is one hundred thousand ringgit as compared with twenty thousand ringgit under s 6, doubt as to the section under which to punish the respondent would have arisen. It would not be fair to place him under the risk of incurring the higher penalty under s 12(3) by taking the substance as going by the name of Indian hemp, since if it were taken as going by the name of cannabis the penalty for the same offence under s 6 would be lower. So if the respondent had been charged for unauthorized possession of Indian hemp under s 12(3), the court would be justified, if it was minded to impose only a fine, and giving the benefit of the doubt to the respondent, to reduce or amend the charge to one of possession of cannabis under s 6. The situation would have resolved into a problem arising from the existence of two different basic penalties for the same offence. It would have had nothing to do, as the trial judge thought, with any question of equality of persons before the law that art 8 of the Federal Constitution guarantees.

But if the amount of the substance had been, say, 40g or 80g, the respondent would have been liable to the increased penalty under s 39A(1) or 39A(2), as the case may be, for possession of cannabis irrespective of the fact that it was also known as Indian hemp. He would not have been able to insist that the case be brought on the basis that the substance should be taken as going by the name 'Indian hemp', that therefore he be charged for unauthorized possession of Indian hemp under s 12, and that the increased penalties under s 39A be not applied to him as s 39A does not mention Indian hemp. That is because the inescapable fact and truth was that the substance, although known also as Indian hemp, was cannabis, and

A cannabis is included in s 39A. The question of giving the respondent the benefit of the lighter penalty would have arisen only in respect of the basic penalty because the Act provided for two basic penalties for the same offence involving the same substance according as to whether it was to be called cannabis or Indian hemp. But when it comes to an increased penalty there would be no doubt that, the substance being cannabis, the increased B penalty in respect of cannabis would apply.

The absence of doubt becomes starkly clear when the case is one of possession of 200g or more in weight of the substance, as is actually the present case, because then the presumption of a different offence arises under s 37(da), namely the presumption of trafficking in the substance. The C substance being cannabis, the presumption arises, even though it is also known as Indian hemp and Indian hemp is not included in s 37(da).The substance being cannabis, and cannabis being included in the section, the fact that it is also known as Indian hemp is not relevant to the question of the application of s 37(da), as it would have been relevant to the question D of the appropriate basic penalty for unauthorized possession.

In our opinion, therefore, the trial judge was in error in his reasons for reducing the charge in this case.

In submission in this appeal, Mr Karpal Singh, in supporting the trial judge's reasoning, said that it was on the same lines as the reasoning in E *Shukri bin Mohamad v Public Prosecutor* [1995] 3 MLJ 229, an authority which was not cited by the judge in his grounds of decision in this case and in the previous case of *Mohammad Khalafi,* and which therefore did not operate on his mind in arriving at his decisions in the two cases. The reasoning in *Shukri* was, in fact, entirely different, and it was so because the F decision in *Shukri* arose from a premise that was diametrically opposed to the evidence in this case, where the evidence is that cannabis is the same substance as Indian hemp.

In *Shukri,* the accused was convicted of trafficking in 36kg of cannabis and was sentenced to death. He appealed to the Supreme Court, and took G up only one ground, which arose from the fact that at that time, as at the time in the present case, the Act had in s 2 a definition for 'cannabis' and also, in Part III of the First Schedule, the item 'Cannabis (Indian Hemp)'. It was argued that the evidence of the chemist had created a doubt as to whether the substance he analysed was 'cannabis' as defined in s 2 or was the 'Cannabis (Indian Hemp)' that was listed in Part III of the First H Schedule. The Supreme Court found certain infirmities in the testimony of the chemist. It is not necessary for the purpose in hand to state what those infirmities were. We need only say that subsequently, the Federal Court, when considering *Shukri* in *Mohd Yusof bin Said v Public Prosecutor* [1996] 1 MLJ 640, gave a summary of the infirmities, saying that there were two I infirmities.

Having noted the infirmities, the Supreme Court in *Shukri* said at p 234:

> Having regard to the infirmities in the testimony of the chemist to which we have adverted, his testimony is open to the construction that the plant material examined by him was either 'cannabis' within the meaning of s 2 of the Act or that it was 'cannabis (Indian Hemp)' listed in Pt III of the First Schedule of the Act, though nowhere defined in the Act.

Further on, at p 235, the Supreme Court said:

> We need hardly add, that if, as we find, that in the context of the relevant legislation 'cannabis' or 'cannabis (Indian Hemp)' even though of the same weight may not be the same thing, in the sense that they may constitute the subject matter of different offences which may be differently penalised, then the presumption of trafficking under s 37(da) of the Act cannot arise, in the present case, ...

It is to be observed that the premise on which the Supreme Court proceeded was that 'cannabis' as defined in s 2 and 'Cannabis (Indian Hemp)' in Part III of the First Schedule might not be the same thing. If 'Cannabis (Indian Hemp)' was different substance from 'cannabis', then the presumption under s 37(da) could not arise in respect of the plant material in the case because 'Cannabis (Indian Hemp)' was not included in the section and neither could it be said that the plant material was 'cannabis', which was so included, because it might be a different substance, 'Cannabis (Indian Hemp)'. That was the reason why the Supreme Court in that case quashed the death sentence and substituted for it a sentence under s 12(3) for an offence under s 12(2).We suppose it was for the same reason that s 37A was not applied to impose an increased penalty. *Shukri* was so decided on the premise that 'cannabis' as defined in s 2 and 'Cannabis (Indian Hemp)' in Part ITT of the First Schedule could be different substances. The decision in *Shukri* cannot be applied to the present case because there is evidence, elicited by counsel for the respondent himself, that 'cannabis' and 'Cannabis (Indian Hemp)' are only two names for the same substance.

As we said, we are of opinion that the trial judge erred in reducing the charge. Therefore we allow this appeal of the public prosecutor, set aside the conviction and sentence, and order that the respondent be called upon to enter upon his defence on the original charge under s 39B(l)(a).

Appeal allowed.

Reported by Peter Ling